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ALEXANDER L. STEVAS,
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No. 82-1304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONTGOMERY WARD & CO., INCORPORATED,
an Illinois Corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, AND WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT UNION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether substantial evidence on the record exists for the enforcement of the order of the National Labor Relations Board to wit:

A. Whether substantial evidence on the record exists for the Board's finding that the Employer's no-solicitation rule was discriminatorily applied against Union solicitation.

B. Whether substantial evidence on the record exists for the Board's finding that application of the Employer's no-solicitation rule by threats of police action and surveillance against two Union organizers and employees who were quietly sitting at a table in a half-empty public cafeteria violated Section 8(a)(1) of the National Labor Relations Act as amended.

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OPINIONS BELOW

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STATEMENT OF THE CASE

A. Proceedings Below

The Union adopts the statement of the proceedings below contained in the Petition at pages 3-4.

B. Statement of Facts

Among the facts upon which the Court of Appeals relied in making its decision were the following:

> The Buffeteria where the organizers and employees planned to meet is a cafeteria-style restaurant, operated by Montgomery Ward [Ward's] as part of a separate food service department.
>
> * * *
>
> Union organizers Polk and Garcia entered the Buffeteria at noon on December 2, and, upon seeing that the credit center employees they planned to meet were already seated at tables eating their lunches, went directly to a table adjacent to the employees. The Buffeteria was about half full at this time, and the patrons nearest the organizer-employee group were seated about fifteen feet away. The organizers chatted briefly with the employees and, upon request by an employee, distributed union authorization cards. [Managers] Harvey and Ruhl, who had been standing in the self-service line, observed Polk and Garcia enter

the Buffeteria and sit down with the credit center employees. Harvey and Ruhl immediately approached the organizer-employee group and asked to speak to the organizers.

Harvey, Ruhl and the union organizers then left that Buffeteria and went into an aisle in the store area (but still within sight of the credit center employees who remained seated at their table). After exchanging introductions, Harvey told the organizers that they were trespassing on Montgomery Ward property and violating company policy by soliciting employees; Harvey told the organizers that if they did not leave, he would ask the police to remove them. Polk and Garcia stated that they would not leave because they thought Harvey's request violated the employees' rights, and they returned to the table where they had been sitting. After discussing the incident with the organizers, the employees left; and Polk and Garcia purchased some food at the self-service counter and returned to the table they had occupied before. In the meantime, Harvey called the police.

After two uniformed police officers arrived, Harvey and Ruhl, accompanied by the police officers, sat down at the union organizers' table. Harvey told the organizers that they could finish eating their lunches but, if they spoke to any employees or refused to leave after eating, he would sign a complaint against them and have them removed. The policemen took the organizers' names and addresses, and then left; Harvey and Ruhl remained seated at a table next to the organizers, watching them finish their lunches. About ten minutes later, the organizers left the Buffeteria, accompanied by Harvey, Ruhl and a plainclothes security guard. The Union filed this unfair labor practices charge five days later on December 7, 1977.

The Union's efforts at contacting the employees after the Buffeteria incident were not very successful. When the organizers distributed union literature on the sidewalks next to the store,

Montgomery Ward called the police to remove them on at least two occasions. The Union was also unsuccessful in gathering information about the credit center workforce. Employees sympathetic to the Union were unable to secure a complete list of credit center employees. Further, the Union was unable accurately to identify (by license number) cars belonging to credit center employees after Montgomery Ward told the credit center employees to park in a new area where their cars were interspersed with automobiles belonging to other employees and customers. (App. 3a-6a, footnotes omitted.)

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Found An Alternate Ground For Granting Substantially The Same Relief Which Is Not Contested Here.

The essence of the Board's Order which the Court of Appeals enforced is that Ward's must not enforce its no-solicitation rule against Union organizers and employees in the Buffeteria when the organizers and employees are comporting themselves in a manner consistent with the purpose of the Buffeteria. (App. 33a) Two grounds exist for enforcement: First, substantial evidence supports the finding by the Board that Ward's discriminatorily enforced its no-solicitation rule against Union solicitation only and, second, the enforcement of the rule under the particular circumstances of this case violates employees' protected rights to be solicited and otherwise to receive information about a Union. Either of these grounds supports the Order. The Order would have to be modified only slightly if the second ground is not supported.

The Petitioner does not assign as error the first ground for enforcing the Board's Order. Accordingly, it will be presumed that the no-solicitation rule was discriminatorily enforced against Union solicitations only. *Prudence Co.* v. *Fidelity and Deposit Co.*, 297 U.S. 198, 56 S. Ct. 387, 80 L. Ed. 581 (1936).

Thus, since one of the grounds for enforcing the Board's Order is not even contested here, there is no substantial question warranting granting of the writ.

2. The Petition Misstates The Court Of Appeals Decision And Its Rationale.

The Petition incorrectly states that the Court's second reason for enforcing the Board's Order rested on the discredited proposition that "private property open to the public acquires a public characteristic." (Petition 11) The Court of Appeals decision reveals, on the contrary, that the Court specifically rejected such a rationale: "We must, therefore, reject . . . the Board's contention that *Babcock & Wilcox* does not apply where access to the employer's premises is open to the public . . ." (App. 17a). Rather, the Court of Appeals held that the conditions under which the property may be open to the public is one circumstance which is significant to the balance between property rights and organizational interests which the Board struck. (Ibid.)

Moreover, the Court of Appeals did not, as the Petition claims, (page 11) rely on *Amalgamated Food Employees' Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L Ed. 2d 603 (1968). *Logan Valley* was a First Amendment case. The Court of Appeals was careful to state:

> "It is important to remember that the standard ultimately being applied is that of the National Labor Relations Act, which Babcock & Wilcox articulates but cannot easily and precisely define for all places and all times." (Ibid.)

In short, the Court of Appeals was careful to apply principles under the National Labor Relations Act, forgetting First Amendment principles which were not raised. This distinguishes this case from *Central Hardware Co.*, v. *NLRB*, 407 U.S. 539, 33 L. Ed. 2d 122, 92 S. Ct. 2238 (1972) where the error assigned was the application of First Amendment principles to NLRA cases. (Id. at 545)

The Petition also misrepresents that:

> "The Seventh Circuit's position [is] that Babcock & Wilcox is limited to its facts...." (p. 10)

Rather, the Court of Appeals held that *its own* decision was limited to its facts in keeping with this Court's teaching in *Babcock & Wilcox*. The Court of Appeals carefully concluded that there was substantial evidence to support the Board's finding:

> "Under the circumstances of this case...." (App. 15a)

> "Although a ban on solicitation in restaurants may amount to an appropriate assertion of property or management rights in restaurants where customer convenience may be compromised if disruptive Union solicitation is allowed, the facts in the case before us do not justify such a ban." (App. 23a)

Rather than limiting Babcock & Wilcox to its facts, the Court of Appeals properly applied the "accommodation" principle enunciated by this Court in *Babcock & Wilcox*, *Central Hardware*, *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 57 L. Ed. 2d 370, 98 S. Ct. 2463 (1978) and *Hudgens* v. *NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976), to wit, that property and management interests must be carefully balanced on the facts of each case against employee organizational interests.

Nor did the Court of Appeals, in striking the balance mandated by this Court, ignore the fact that the persons against whom the rule was initially enforced were non-employees, whose rights are different from those of employees. Neither, however, did the Court of Appeals ignore the fact that employees themselves were desirous of receiving the solicitation and were participants in the solicitation forbidden by Ward's. (App. 7a)

Finally, the Petition misrepresents that the Court of Appeals engaged in prohibited fact finding (Petition 13-14). The Court of Appeals did not find that the outside Union organizers had no

other reasonable means of access to the employees other than the use of the cafeteria within the meaning of *Babcock & Wilcox*. Rather, in balancing the respective interests, the Court of Appeals considered the difficulty that the outside organizers had in obtaining access to the employees in this location. (App. 18a-19a) The Court of Appeals did not find that the employees were inaccessible; the Court of Appeals rather took facts found by the Board and applied them to its balancing test.

The substantial misrepresentations of the Court of Appeals decision by the Petitioner is yet another ground for denial of the writ.

3. No Substantial Federal Question Warranting Granting Of A Writ Is Presented In This Case.

It has already been established that the Court of Appeals specifically limited its enforcement of the Board's Order to those facts presented in this case. Those facts included the difficulty of Union access through alternate channels, the characteristic use to which Ward's dedicated the Buffeteria property, the condition of the Buffeteria at the time that the solicitation was made, the manner in which that solicitation was made, the number of persons involved, that the employees were on their lunch break and had, in fact, purchased food to be consumed in the Buffeteria, and all of the other facts found by the Board and its Administrative Law Judge.

The Court was very careful to avoid the enunciation of wide-reaching principles which would mandate such orders in other fact situations. The Court of Appeals was very careful to weigh and consider the particular facts in this case, the property and management interests asserted by Ward's and the legitimate management and property interests that Ward's had in the use of the Buffeteria. It was only after concluding that Ward's in this case had no legitimate managements interests which conflicted

with the manner and usage of the Buffeteria by the Union organizers and the solicited employees that the Court of Appeals held for the Board on the second ground.

These precise facts are unlikely to recur in other cases. Thus, granting the writ here would be to grant the writ to decide questions which are of interest only to the litigating parties and not to the general development of the law.

4. The Court Of Appeals Correctly Decided The Issue Under The Law Of This Court.

The fundamental principle applied by the Court of Appeals is a balancing of organizational interest protected by the National Labor Relations Act against management and property interests protected by the Constitution of the United States. Only if such a balancing test is rejected was the decision of the Court of Appeals erroneous on the second ground.

All of the decisions cited by the Court of Appeals lead to the inescapable conclusion that it is the teaching of this Court that those interests considered by the Court of Appeals must be weighed, evaluated and balanced, as the Court of Appeals properly did.

The thrust of this Court's decisions in *Babcock & Wilcox*, *Beth Israel*, *Hudgens* and *Central Hardware* is that property rights and organizational rights must be accommodated "with as little destruction of one as is consistent with the maintenance of the other." (351 U.S. at 112). This is the "guiding principle" of the *Babcock & Wilcox* decision. (407 U.S. at 539; 424 U.S. at 522) The reason for refusing to enforce the Board's order in *Babcock & Wilcox* was that the Board had wrongly applied the standard for employee solicitation to non-employees without considering the different interests raised.

Sears, Roebuck & Co. v. *San Diego County Council of Carpenters*, 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978) and *Central Hardware* do not support the Petition.

Central Hardware simply stands for the proposition that NLRA interests, not constitutional right standards, should apply in solicitation cases on employer property. The Court of Appeals in this case properly rejected constitutional standards and used the NLRA balancing test for which *Central Hardware* stands.

Sears Roebuck is similarly inapplicable because it was a preemption case in which the picketing, not solicitation, was a clear trespass as opposed to this case where, as the Court of Appeals properly found, the Union organizers were, at least at first, business invitees. Moreover, the language quoted from the *Sears* opinion is not its holding but only illustrative of the principle that the state court injunction had little probable effect upon legitimate interests protected by the National Labor Relations Act.

Since the Court of Appeals properly adopted this Court's balancing test, the writ should be denied.

CONCLUSION

Wherefore, for the reasons herein stated, as well as any additional reasons to be presented by the Solicitor General, the Union Respondent submits that the Petition should be denied.

Respectfully submitted,

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Counsel for Union Respondent

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Harvey, Ruhl and the union organizers then left that Buffeteria and went into an aisle in the store area (but still within sight of the credit center employees who remained seated at their table). After exchanging introductions, Harvey told the organizers that they were trespassing on Montgomery Ward property and violating company policy by soliciting employees; Harvey told the organizers that if they did not leave, he would ask the police to remove them. Polk and Garcia stated that they would not leave because they thought Harvey's request violated the employees' rights, and they returned to the table where they had been sitting. After discussing the incident with the organizers, the employees left; and Polk and Garcia purchased some food at the self-service counter and returned to the table they had occupied before. In the meantime, Harvey called the police.

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CONCLUSION

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